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91-1559

Supreme Court, U.S.
FILED
MAY 22 1992
OFFICE OF THE CLERK

No. 91-1159

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GREGORY J. AVERY AND KATHLEEN R. AVERY,
Petitioners,

versus

JEAN O. TURNER, TRUSTEE,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

PETITIONERS' REPLY BRIEF

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Gregory J. and Kathleen R. Avery ("Debtors") respectfully submit this reply to respondent's opposition to Debtors' Petition for Writ of Certiorari ("Petition") to the United States Court of Appeals for the Fifth Circuit.

REASONS FOR GRANTING THE PETITION

I. THE PARTIES DO NOT DISPUTE THE EXISTENCE OF A SPLIT AMONG THE CIRCUITS AND THE IMPORTANCE OF THE FEDERAL QUESTION PRESENTED.

Debtors have petitioned this Court for a writ of certiorari to the Fifth Circuit to review the following question of federal law:

> Whether, in a Chapter 7 bankruptcy liquidation, post-petition payments for the debtor's services rendered both before and after the filing date pursuant to a rejected or a nonassumable pre-petition executory contract belong to the estate, the debtor, or both under the Bankruptcy Code, 11 U.S.C. § 541 and § 365.

In opposition, respondent does **not** dispute that the United States Circuit Courts of Appeals are divided on the question presented. *Cf. In re Tleel*, 876 F.2d 769, 770 (9th Cir. 1989); *In re Lovitt*, 757 F.2d 1035, 1041 (9th Cir.), *cert. denied sub nom. Cheadle v. Appleatchee Rider's Association*, 474 U.S. 849 (1985); *In re Moreggia & Sons, Inc.*, 852 F.2d 1179, 1185 (9th Cir. 1988); *In re Gravure Paper & Board Corp.*, 234 F.2d 928, 930 and 932 (3rd Cir. 1956); and *Ford, Bacon & Davis, Inc. v. Holahan*, 311 F.2d

901, 902 (5th Cir.), *cert. denied* 373 U.S. 913 (1963) with *Turner v. Avery*, 947 F.2d 772, 774 (5th Cir. 1991) and *In re Calder*, 912 F.2d 454 (10th Cir. 1990). Furthermore, respondent does **not** dispute the importance of resolving the split of authority on this federal question of law.

II. THE EXISTENCE OF A STATE LAW ISSUE HAS NO BEARING ON WHETHER TO GRANT THIS PETITION.

Instead, respondent turns to the merits of the case, arguing the post-petition payments Debtors received were not made pursuant to an executory contract. Respondent challenges whether this Court would reach the question presented if it grants Debtors' Petition. Respondent's challenge is lacking.

Effective May 1, 1985, petitioner Gregory J. Avery and Ray Orrill, both attorneys, mutually terminated their law partnership before Debtors filed for bankruptcy on May 22, 1985. The trial court found the partners agreed to complete the partnership's contingent fee contracts as follows:

> After the termination of the partnership, each attorney with primary responsibility for a case was to continue to manage the case to conclusion and all expenses were to be

> funded by the attorney assigned the case. . . . Upon completion of a partnership case, the parties agreed that. . . [t]en percent of the fee would be placed in the partnership account to pay for partnership debts and any costs advanced by the partnership. . . . Costs advanced by the attorney would be paid directly to the attorney; the balance of the fee would be split evenly.

Findings of Fact and Conclusions of Law, Appendix C.1 to Petition for Writ of Certiorari, pp. 19-20, ¶ 4.

Debtors received post-petition payments pursuant to this "private settlement agreement."[1] Respondent initiated an adversary proceeding under 11 U.S.C. § 542 against Debtors, claiming as property of the bankruptcy estate **all** attorney's fees Debtors earned and received from the former partnership's contingent fee contracts after filing their bankruptcy petition.

Issues of the existence and scope of a debtor's interest in a given asset are resolved by reference to state

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[1]Debtors adopt this term respondent used to describe the former partners' agreement governing completion of their contingent fee contracts and distribution of the resultant fees. Respondent's Brief in Opposition, p. 13.

law. *In re Farmers Markets, Inc.*, 792 F.2d 1400, 1402 (9th Cir. 1986). The parties dispute the effect of the partnership's termination on ownership of the former partnership's contingent fee contracts under Louisiana state law. As a result, the parties disagree over the identity of the "given asset" pursuant to which Debtors received post-petition payments.

The existence of this dispute is irrelevant to this Court's decision of whether to grant Debtors' Petition because resolution of this issue will have no bearing on whether this Court will reach the question presented. No matter how this issue is resolved, the "given asset" entitling Debtors to receive post-petition payments is a nonassumable or rejected executory contract.

A. Debtors' Contention Regarding the State Law Issue.

Debtors contend that upon dissolution, the partnership ceased to exist as a separate entity and could no longer own assets. The former partners each became owners of undivided interests in the contingent fee contracts. Accordingly, the fees Debtors received were for services rendered pursuant to these contingent fee contracts. Such contracts are nonassumable executory contracts. *In re Tonry*, 724 F.2d 467, 468-69 (5th Cir. 1964); *Turner v. Avery*, 947 F.2d 772, 774 (5th Cir. 1991).

Debtors ask this Court to resolve the question presented in terms of whether the post-petition payments Debtors received for services rendered pursuant to these nonassumable pre-petition executory contingent fee contracts belong in the bankruptcy estate.

B. Respondent's Contention Regarding the State Law Issue.

A Louisiana partnership may maintain a *fictional* existence for the purpose of liquidation. LA. CIV. CODE ANN. art. 2828 and 2834 (West Supp. 1992). Respondent contends the partnership continued to exist and own assets, including the contingent fee contracts, after termination. According to respondent, each partner owned an interest in the terminated *partnership*, not in the contracts, when Debtors filed for bankruptcy. Respondent concedes Debtors received post-petition payments pursuant to a private settlement agreement governing liquidation of the contingent fee contracts, but erroneously contends this agreement was not executory.

An executory contract is one "on which performance remains due to some extent on both sides." *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522 n.6 (1984). As noted above, the trial court found each former partner bound himself to render the legal services and advance the expenses necessary to complete those case for which the

partner had primary responsibility. In return, each partner would receive forty-five percent of all fees earned. On the filing date performance remained due to some extent on both sides, *i.e.*, both partners had obligations to each other and to their clients to perform legal services and fund expenses[2]; therefore, the private settlement agreement, like the contingent fee contracts, was executory.

Assuming under state law the terminated partnership continued to own the contingent fee contracts, this Court would address the question presented in terms of whether any of the post-petition payments Debtors received for services rendered pursuant to a nonassumable pre-petition executory private settlement agreement belong in the bankruptcy estate. Thus, this Court will reach the question presented even assuming the correctness of respondent's position on the state law issue.

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[2]Respondent first concedes the partnership liquidation agreement "called for each attorney to provide service and advance costs for which he would receive forty-five percent of the recoverable attorney's fees and costs," but then argues "the non-debtor law partner had no responsibility for performance, only the right to participate in the collection of attorney fees and costs therefrom." Respondent's Brief in Opposition, p. 16. Respondent fails to recognize that the non-debtor partner was obligated to complete the cases for which he had primary responsibility and to split the fees he recovered, in return for which he shared in the fees recovered on the cases handled and funded by the debtor attorney.

CONCLUSION

The existence of the dispute over the proper application of state partnership law should have no bearing on this Court's decision of whether to grant Debtors' Petition because it will not affect this Court's analysis of the question presented. Both the contingent fee contracts and the private settlement agreement were executory. Whether this Court rules Debtors' received the payments for services rendered pursuant to the contingent fee contracts or the private settlement agreement, the Court will reach the question whether post-petition payments for the Debtors' services rendered *pursuant to a rejected or nonassumable pre-petition executory contract* belong in the bankruptcy estate.

Respondent does not deny the importance of the question presented. Also, respondent does not deny the split of authority regarding this federal question among the United States Circuit Courts of Appeals. This split has and will cause inconsistent application of the Bankruptcy Code to executory contracts. Furthermore, the law adopted by the Fifth and Tenth Circuits frustrates Congress' policies of promoting speedy and inexpensive administration and settlement of bankruptcy estates and of securing for the debtor a fresh start. Accordingly, this

Court should grant a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to resolve the question presented.

Respectfully submitted,

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